(1) Supreme Court, U.S.
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In The

Supreme Court of the United States

DAVID P. CERVONE

Petitioner,

v.

ELIZABETH M. CERVONE N.K.A.
ELIZABETH M. MATTEUCCI

Respondent,

On Petition For Writ Of Certiorari
To The Mahoning County Court of Appeals
Ohio Seventh Appellate District

PETITION FOR WRIT OF CERTIORARI

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4 copies

QUESTIONS PRESENTED

I. Whether, in situations where a child receives payments under Title II of the Social Security Act (42 USCS §401 et. seq), Ohio courts calculate child support in a manner that improperly discriminates in favor of disabled parents, and violates the rights of non-disabled parents to equal protection under the Fourteenth Amendment to the Constitution of the United States.

II. Whether, in situations where a child receives payments under Title II of the Social Security Act (42 USCS §401 et. seq), Ohio courts calculate child support in a manner that improperly discriminates in favor of certain classes of children, and violates the rights of other classes of children to equal protection under the Fourteenth Amendment to the Constitution of the United States.

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OPINIONS BELOW

The January 11, 2000 judgment and opinion of the Ohio Seventh District Court of Appeals, *Cervone v Cervone*, 2000 Ohio App. LEXIS 298, Mahoning App. No. 98 CA 99, unreported, is reproduced in Appendix A. The April 10, 1998 judgment of the Mahoning County Court of Common Pleas Division of Domestic Relations, is not published and is reproduced in Appendix B. The February 16, 2000 journal entry of the Ohio Seventh District Court of Appeals certifying a conflict is not published and is reproduced in Appendix C. The Ohio Supreme Court's May 17, 2000 dismissal of petitioner's certification of conflict by the Court of Appeals for Mahoning County, *Cervone v. Cervone*, 728 N.E. 2d 400, is reproduced in Appendix D. The Ohio Supreme Court's May 17, 2000 dismissal of petitioner's discretionary appeal, *Cervone v. Cervone*, 728 N.E.2d 403, is reproduced in Appendix E, The Ohio Supreme Court's July 12, 2000 denial of petitioner's motion for reconsideration, *Cervone v. Cervone*, 89 Ohio St.3d 1443, is reproduced in Appendix F.

STATEMENT OF JURISDICTION

Judgment of the Ohio Supreme Court was entered on May 17, 2000, and reconsideration denied on July 12, 2000. This Court's jurisdiction to consider this petition from the final judgment or decree by the highest court of the state in which the decision could be had is invoked pursuant to 28 USCS §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves matters of equal protection as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The marriage of petitioner, David P. Cervone, and respondent Elizabeth M. Cervone was terminated by judgment entry of divorce entered February 8, 1983. Originally, appellant was granted custody of the parties' only child, Charles Cervone, born on December 14, 1979, and no child support was ordered to be paid by respondent.

Sometime in 1990, respondent became disabled, making her eligible for Social Security benefits. As a result of respondent's disability, petitioner applied for Social Security benefits on behalf of Charles in June 1992. Petitioner subsequently began receiving the child's Social Security benefits, as representative payee, in October 1992.

In July 1992, respondent requested custody of the child. On September 3, 1993, respondent was granted custody and petitioner was ordered to pay "token" child support of $20.00 per month due to the fact that the child's Social Security benefit was greater than the total combined support obligation of the parties as calculated under Ohio's Child Support Guidelines. Respondent immediately applied to be named representative payee for the child's Social Security benefits and began receiving said benefits in October 1993, along with a lump sum payment of $4,782.89, which petitioner had not used for the support of the child. In November, 1995, upon the motion of respondent, the "token" child support was increased to $30.00 per month.

In October, 1996 respondent filed another motion for modification of child support. On November 24, 1997, the magistrate filed a decision with findings of fact and conclusions of law wherein the child's Social Security benefits were added to respondent's income for the purpose of determining the total gross income of the parents. Using this figure, the magistrate determined the combined annual support obligation of the parents under Ohio's Child Support Guidelines (ORC §3113.215) and then apportioned that obligation between the parties according to their percentage contribution to the total gross income figure. No reductions, credits, or offsets were made against either party's final support obligation based on the Social Security benefits received by respondent on behalf of the child.

Petitioner timely filed objections to the magistrate's decision wherein he argued that: (1) the child's Social Security benefit should not be added to the respondent's income; and (2) that the child's Social Security benefit should be deducted from the total support obligation and any shortfall be apportioned between the parties according to their respective percentages. The trial court ruled on these objections on April 10, 1998 (see Appendix B) and accepted the magistrate's method of adding the child's benefit to the income of respondent, and not allowing either party a credit for the child's Social Security benefit.

Petitioner timely filed an appeal with the Ohio Seventh District Court of Appeals wherein he asserted that the trial court erred by adding the child's Social Security benefit to respondent's income for the purposes of determining the combined gross income of the parties, and by approving a method of calculating child support which resulted in producing a monetary gain to respondent, and/or effectively resulted in an upward deviation from the appropriate guideline support amount.

In its January 11, 2000 opinion (see Appendix A), the court of appeals sustained petitioner's first assignment of error and ruled that a child's Social security benefits should not be added to either parties income. The court overruled petitioner's second assignment of error finding that a child's Social Security benefits should be deducted *only* from the support obligation of the parent whose disability occasioned the issuance of the benefits.

Petitioner timely filed a motion to certify a conflict based on the fact that the Seventh District's decision was in conflict with numerous decisions in other districts. On February 16, 2000 the Court of Appeals certified that a conflict existed (see Appendix C) and petitioner timely filed a Notice of Certified Conflict with the Ohio Supreme Court. Petitioner also timely filed a discretionary appeal with the Ohio Supreme Court.

On May 17, 2000 the Ohio Supreme Court dismissed petitioner's certified conflict cause (see Appendix D), and also declined to accept jurisdiction to hear the discretionary appeal (see Appendix E). Petitioner timely filed a Motion for Reconsideration wherein he asserted that the court of appeal's method of calculating child support violated his Fourteenth Amendment right to equal protection. The Ohio Supreme Court denied the Motion for Reconsideration on July 12, 2000 (see Appendix F).

REASONS FOR GRANTING THE WRIT

SUMMARY

Ohio's Child Support Guidelines, originating as the Ohio Supreme Court's Rules of Superintendence for Court's of Common Pleas Rule 75 [Eff. 10-1-87], and codified in 1990 as ORC §3113.215, were developed pursuant to the mandates of Public Law 98-378, and are based on the Income Shares Model developed by the Child Support Guidelines Project of the National Center for State Courts, under a grant from the U.S. Office of Child Support Enforcement. See Oh. S.Ct. C.P. Sup. R. 75 [Eff. 10-1-88] at paragraph 4 of the Preface. The Income Shares Model is predicated on the concept that the child should receive the same proportion of parental income that he or she would have received if the parents lived together. *Id.*[1] The guidelines calculate child support as a share of *each* parent's income living in an intact household. *Id.* at paragraph 6 of the Preface.[2]

Although the aforementioned concepts underlying ORC §3113.215, the Child support Guidelines, are easily satisfied in most cases, the statute provides no specific guidance on how child support should be calculated, or is affected, in situations where a child[ren] receives payments under Title II of the Social Security Act (42 USCS §401 et. seq.) due to the retirement, death, or as in this case, disability of a parent. Instead, in Ohio, this matter has been developed through judicial construction.

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[1] See also Development of Guidelines for Establishing and Updating Child Support Orders, (National Center for State Courts; Denver June 1985), p.64

[2] *Id.* at p.65

Benefits paid to or on behalf of children under Title II of the Social Security Act (42 USCS §401 et. seq.) *must*, by law, be applied towards the child's current maintenance, which includes the cost of obtaining food, shelter, clothing, medical care, and personal comfort items. See 20 CFR §404.2040(a). It is unlawful to use Title II payments for any other purpose. See 42 USCS §408(a)(5). Accordingly, Ohio courts have repeatedly held that a child's Title II benefits may take the place of court ordered child support paid by a parent [s]. *Gilford v Wurster,* 24 Ohio App.3d 77,78; 493 N.E.2d 258, 260, (1983); *McNeal v. Cofield,* 78 Ohio App.3d 35,40; 603 N.E. 436, 439, (1992); and *Williams v. Williams,* 88 Ohio St.3d 441, 727 N.E.2d 895, (2000).

Since the introduction of the Child Support Guidelines in 1987, most Ohio courts have dealt with a child's Title II payments through the application of a mathematical model developed in *McNeal, supra.*at 39; 438. The "*McNeal* formula" subtracts the child's annual Title II benefits from the total combined annual support obligation of the parents, as determined under the guidelines, and then allocates any remaining shortage to each parent according to their percentage contribution to the combined total of their incomes. This method mathematically insures, *in all scenarios,* that the child will enjoy the proper "rebuttably presumed correct" level of support, as determined by the incomes of the parents, and that the Title II benefits received by or on behalf of a child[ren] will reduce the support "load" against each parent's income in a proportional manner, *exactly* as it would in an intact household, thus satisfying the conceptual underpinnings of ORC §3113.215.

The Seventh District Appellate Court in this case, "disagreed" with *McNeal* and ruled that *only* the disabled [deceased, or retired] parent was entitled to receive a credit

for a child's Title II benefits. This methodology offends the precepts on which the support guidelines are based and, more importantly, discriminates against non-disabled parents as a class, and certain classes of children, without reasonable basis, as discussed below.

ARGUMENT

I. WHETHER, IN SITUATIONS WHERE A CHILD RECEIVES PAYMENTS UNDER TITLE II OF THE SOCIAL SECURITY ACT (42 USCS §401 ET. SEQ), OHIO COURTS CALCULATE CHILD SUPPORT IN A MANNER THAT IMPROPERLY DISCRIMINATES IN FAVOR OF DISABLED PARENTS AND VIOLATES THE RIGHTS OF NON-DISABLED PARENTS TO EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In order to see the discriminatory effects of the Seventh District Appellate Court's decision in this case, on non-disabled parents, it is necessary to examine various case scenarios wherein the combined incomes of the parents, and the corresponding rebuttably presumed correct guideline combined annual support obligations, do not change. Using this type of analysis, it is possible to observe, as other facts vary, how disabled and non-disabled parents are impacted.

Case A assumes that a non-disabled obligor parent has an annual income of $30,000, and a non-disabled custodial obligee parent has no income [$0]. With a combined annual income of $30,000, Ohio's 1998 Guidelines specify a rebuttably presumed correct combined annual support obligation of $5377. Since the obligor is responsible for 100% of the income, $5377 would be paid annually by the obligor to the custodian obligee for the support of the child.

Case B simply reverses the income pattern, making the obligee parent's income $30,000, and the obligor parent's income $0. In this scenario, the rebuttably presumed correct combined support obligation would still be $5377, since the combined incomes have not changed. However, in this case, the obligee would be responsible for 100% of the annual support obligation, and the obligor's support order would be $0. It would be presumed that the custodian obligee would provide the full $5377 for the support of the child pursuant to ORC 3113.215(C). Just as in Case A, the child would have $5377 available for his/her annual support.

Case C, assumes the same income pattern as in Case A except that now the obligor is disabled and the custodian obligee parent is receiving, as representative payee, annual Title II payments of $5377 for the child. As in Case A, the rebuttably presumed correct combined support obligation is $5377, with 100% once again being allocated to the obligor. However, the court of appeals decision in this case mandates that a full credit for the child's Title II benefits would be applied against the disabled obligor's support obligation producing a final support order of $0. There would be no court ordered support paid to the non-disabled obligee and the *only* funds available for the support of the child would be the $5377 in Title II benefits which, pursuant to 42 USCS §408(a)(5), the obligee/representative payee could only use *for the sole benefit of the child.* Restated, the court of appeals decision, in this case, stands for the proposition that a guideline determined child support obligation may be satisfied, in full, by Title II payments made to, or on behalf of, a child. It is also important to note that the non-disabled obligee is prevented, by Federal Statute, from deriving any personal benefit from the "support" which he or she receives in the form of Title II payments.

Case D assumes the same income pattern as in A&C except that now the obligee parent, instead of the obligor, is disabled, as in the case at bar. The rebuttably presumed correct combined annual support obligation is still $5377 and, as in A&C, will be allocated 100% to the non-disabled obligor. In this scenario however, court of appeals decision mandates that the non-disabled obligor pay $5377 annual court ordered support to the disabled obligee. The disabled obligee parent therefore receives $5377 from the obligor *and,* as representative payee, $5377 from the child's Title II benefits. Since there is no legal requirement that the $5377 court ordered support be used for the benefit of the child, the obligee parent is free to use the $5377, *paid by the non disabled obligor*, solely for their own benefit, all the while relying on the Title II benefits to provide the rebuttably presumed correct child support of $5377.

The aforementioned examples show conclusively that the methodology applied by the court of appeals in this case results in disabled parents *always* being treated more favorably than non-disabled parents. Disabled parents will, as obligors, enjoy a reduction or total elimination of their support obligation and will, as obligees, enjoy a cash windfall which may be used solely for their own benefit, all while the child is supported at the rebuttably presumed correct support level by the Title II benefits. Conversely, non-disabled parents *never* enjoy a reduction in their child support obligations, and *never* receive any payments that can be used for their own benefit.

Accordingly, the Seventh District Court of Appeals decision in this case violates, without reasonable basis, the rights of non-disabled parents, as a class, to equal protection under the Fourteenth Amendment to the Constitution of the United States.

II. WHETHER, IN SITUATIONS WHERE A CHILD RECEIVES PAYMENTS UNDER TITLE II OF THE SOCIAL SECURITY ACT (42 USCS §401 ET. SEQ), OHIO COURTS CALCULATE CHILD SUPPORT IN A MANNER THAT IMPROPERLY DISCRIMINATES IN FAVOR OF CERTAIN CLASSES OF CHILDREN AND VIOLATES THE RIGHTS OF OTHER CLASSES OF CHILDREN TO EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A close examination of scenarios above reveals that in situations where neither parent is disabled (Cases A&B), or where an obligor parent is disabled (Case C), a child[ren] will *always* be supported at the rebuttably presumed correct support level. And, in Case D, if the disabled obligee parent chose to [legally] use *all* of the court ordered support for their own benefit, the child[ren] would *still* be supported at the rebuttably presumed correct support level by the $5377 Title II benefits.

If, on the other hand, a disabled obligee parent chose to use all, or part, of the court ordered support for the benefit of the child[ren], in addition to the Title II benefits, such child[ren] would enjoy a higher level of support than would their less fortunate counterparts who had non-disabled parents or who were receiving Title II benefits occasioned by the disability of an *obligor* parent.

Accordingly, the Seventh District Court of Appeals decision in this case violates, without reasonable basis, the rights of children of non-disabled parents and children of disabled obligor parents, as a class, to equal protection under the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

This court should review the decision of the Ohio Seventh District Court of Appeals in this case and determine if it violates the equal protection rights of various classes of parents *and* children as argued above.

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX A–Opinion And Order Of The Ohio Seventh District Court Of Appeals

CASE NO. 98 CA 99

STATE OF OHIO, MAHONING COUNTY,
IN THE COURT OF APPEALS SEVENTH DISTRICT

2000 Ohio App. LEXIS 298

DAVID P. CERVONE,
Plaintiff-Appellant

v

ELIZABETH M. CERVONE N.K.A.
ELIZABETH M. MATTEUCCI,
Defendant-Appellee

January 11, 2000, Decided
January 11, 2000, 1999, Filed

Civil Appeal from Mahoning County Common Pleas Court,
Domestic Relations Division
Case No. 82-DR-1081

JUDGMENT: Reversed and remanded

JUDGES:
Hon. Gene Donofrio
Hon. Edward A. Cox
Hon. Joseph J Vukovich

DONOFRIO, J.

Plaintiff–appellant, David P. Cervone, appeals from an order of the Mahoning County Common Pleas Court, Division of Domestic Relations, concerning a modification of child support.

The parties' marriage was terminated by judgment entry of divorce entered February 8, 1983. Originally, appellant was granted custody of the parties' only child, Charles Cervone, born on December 14, 1979.

Sometime in 1990, defendant-appellee, Elizabeth M. Cervone, became disabled, making her eligible for social security benefits. As a result of appellee's disability, the child began receiving separate derivative benefits in 1992.

In July 1992 appellee requested custody of the child. In September 1993 appellee was granted custody and appellant was ordered to pay child support of $20.00 per month. In November 1995 this amount was increased to $30.00 per month.

In October 1996 appellee filed a motion for modification of child support. On November 24, 1997, the magistrate filed a decision with findings of fact and conclusions of law. The magistrate prepared two child support calculation worksheets to determine appellant's child support obligation, the first covering the period from October 1996 through June 1997 when appellant was employed, and the second starting from June 1997 when appellant was receiving only unemployment compensation. On both of these worksheets, the magistrate attributed the child's social security derivative benefits to appellee's income only, citing to this court's previous decision in *In re Mudrak* (Jan. 22, 1997), Belmont App. No. 94-B-32, unreported, 1997 WL 28557.

The worksheets prepared by the magistrate determined the combined annual child support obligation that was due and apportioned that obligation between the parties. No reductions, credits, or offsets were made against either parties' portion of the combined annual child support obligation based on the child's receipt of separate social security derivative benefits.

Appellant filed objections to the magistrate's decision and the trial court ruled on those objections on April 10, 1998. The court recommitted one issue back to the magistrate unrelated to the social security benefits issue. The court's decision otherwise accepted the magistrate's decision in full, including the method used to calculate the child support obligations. This appeal followed.

Appellant alleges in his first assignment of error that:

> "THE TRIAL COURT ERRED, AS A MATTER OF LAW, BY DECIDING THAT SOCIAL SECURITY BENEFITS BELONGING TO A CHILD, SHOULD BE ADDED TO APPELLEE'S INCOME, FOR THE PURPOSE OF DETERMINING APPELLEE'S GROSS INCOME UNDER R.C. 3113.215."

Appellant alleges in his second assignment of error that:

> "THE TRIAL COURT ERRED, BY APPROVING THE MAGISTRATE'S METHOD OF CALCULATING CHILD SUPPORT OBLIGATION UNDER R.C. 3113.215 WHERE SUCH METHOD RESULTS IN EITHER A MONETARY GAIN TO APPELLEE, OR EFFECTIVELY RESULTS IN AN UPWARD DEVIA-

TION FROM THE CHILD SUPPORT OBLIGATIONS, OR BOTH."

Both of appellant's assignments of error raise a common issue - how to account for a child's social security derivative benefits in calculating child support according to the guidelines set forth in R.C. 3113.215. Therefore, they will be discussed together.

Appellant argues that the child's social security derivative benefits should not have been included in the determination of appellee's gross income. Appellant argues that the benefit inures directly to the child and that no indices of appellee's ownership ever attach to these funds. Appellant argues that the benefits should be deducted from the combined annual child support obligation and any remaining child support obligation should be allocated to each parent according to the percentage or portion they're responsible for, citing *McNeal v. Cofield* (1992), 78 Ohio App.3d 35.

The magistrate relied solely on this court's decision in *In re Mudrak* (Jan. 22, 1997), Belmont App. No. 94-B-32, unreported, 1997 WL 28557, in adding the child's social security derivative benefits to appellee's income in making the guideline determination of child support. The magistrate stated:

> "In the recent case of [*Mudrak*], the Seventh District Court of Appeals had occasion to review a number of previous decisions addressing the treatment of Social Security Derivative benefits received by a minor child as a result of a parent's disability. In *Mudrak*, the Mother had died and the children were placed in the care of her parents. The Grandparents had received social security derivative benefits for the child in the amount of $4,4044.00 [sic]. which

amount exceeded The [sic] guidelines computed support for the Father of $3,432.00. The Father sought a dollar for dollar credit against this obligation which would result in his having no support obligation at all. The Court rejected his argument concluding that to do so would result in a windfall for the Father as a result of the death of the Mother. The Court further noted that this could hardly be considered to be in the best interests of the child. The Court determined that the social security benefits received.., on behalf of the child should be added to the Appellant's (in this case the Father's) annual salary to arrive [sic] an annual child support figure. Then the relative percentages should be applied to arrive at the annual obligation. The Opinion gave no rationale for including the child's benefits in the Obligor-Father's, as opposed to Obligee-Grandparents' income for Worksheet purposes, and this Court could conceive of none. In checking with the Clerk of the Court of appeals [sic], it was discovered that the reference to the Appellant's income was an error in transcription since the original trial court's decision that was being affirmed had added the income to the Obligee-Grandparent's Income.[1] This Court agrees that logic and common sense dictate that the derivative benefits received as a result of the obligee's death or disability should clearly be added to the Obligee's income and that is how it will be applied here.

[1] The magistrate's and trial court's reliance on this interpretation by the "Clerk of the Court of appeals" is perplexing given the well recognized rule that a court speaks only through its journal entry and not by oral pronouncement. *Schenley v. Kauth* (1953), 160 Ohio St. 109, syllabus.

> Thus, the $7,440.00 per year the Mother receives for the child will be added to her income for Worksheet purposes." November 24, 1997 Magistrate's Decision, pp. 6-7, paragraph 13

In its decision on appellant's objections to the magistrate's decision, the trial court stated:

> "The Magistrate, inter alia, concluded that the Social Security benefits received by Defendant on behalf of the parties' child should be added to Defendant's income for the purposes of calculating the parties' respective child support obligations. Furthermore, the Magistrate concluded that Plaintiff should not be credited with the Social Security benefits received by the child--in other words, that Plaintiff's child support obligation should not be 'set off' by the amount of Social Security benefits received by the child.
>
> "Plaintiff objects to the failure of the Magistrate to give him credit for the amount of Social Security benefits received by his son, and to the Magistrate's application of said Social Security benefits in the calculation of Plaintiff's child support obligation (see Plaintiff's Appeal/Objection,' paragraphs 4 and 5) . The Court finds these objections to be without merit.
>
> "Where the Ohio Supreme Court is silent, this Court is bound by the decisions of the Seventh District Court of Appeals. As the Magistrate noted in his Decision, the Seventh District Court of Appeals has 'had occasion to review a number of previous decisions addressing the treatment of Social Security [d]erivative benefits received by a

> minor child as a result of a parent's disability.' In the case of *In re Mudrak* the Court of appeals expressed that, for purposes of determining support, the Social Security benefits should be added to the income of the parent whose disability had occasioned the derivative benefits to the child. Then, after an annual support figure is reached, the relative percentages should be applied to arrive at the annual child support obligations. The Court specifically disagreed with the position that Social Security benefits should be deducted from the final support amount before the relative percentages are applied to yield a final child support figure. Furthermore, the Court of Appeals specifically refused to credit the father with the Social Security payments because it was not his disability or death that caused the payments.
>
> "In accordance with *Mudrak*, therefore, this Court will affirm the Decision of the Magistrate with regard to the application of Social Security derivative benefits for the purpose of determining child support. Plaintiff's Objections regarding the Social Security payments (see 'Plaintiff's Appeal/ Objection,' Paragraphs 4 and 5) are hereby overruled." (Footnotes omitted.) April 10, 1998 Judgment Entry ruling on appellant's objections to the Decision of the Magistrate dated November 24, 1997, pp. 1-3, paragraph 1

This court has addressed the issue of what affect social security derivative benefits should have on the determination of child support in two previous unreported cases, *In re Mudrak* (Jan. 22, 1997), Belmont App. No. 94-B-32, unre-

ported, 1997 WL 28557, cited by the trial court, and *Stephenson v. Stephenson* (Mar. 18, 1996), Mahoning App. No. 94 C.A. 67, unreported, 1996 WL 133000. Each of those decisions reviewed *McNeal v. Cofield* (1992), 78 Ohio App.3d 35 and *Pride v. Nolan* (1987), 31 Ohio App.3d 261. *McNeal* and *Pride* represent the two primary lines of cases dealing with issue, each taking a different approach.

In *Pride*, the parties were divorced in 1966 and the father was ordered to pay child support. The father lost his job in 1975 and thereafter failed to pay support. In 1978 the father suffered a heart attack which left him permanently disabled. As a result, he and his children each received social security benefits. The children became emancipated in 1980 and 1984, respectively.

In 1985, the mother filed a motion to reduce a support arrearage which had accrued to a lump sum judgment. The trial court awarded the mother a lump sum judgment of $5,704.80, the total arrearage of $12,415.00 less $4,725.20 the children received in social security benefits due to the father's disability and $1,985.00 in support payments which the father had made after 1975.

On appeal, the mother argued that the trial court had erred in reducing the arrearage by $4,725.20, the amount of the social security payments made to the children. The *Pride* court characterized social security payments as "a substitute for the disabled parent's earnings" and not as "gratuities from the federal government." *Pride*, *supra*. 263. Affirming the decision of the trial court, the *Pride* court then held "that social security payments received on behalf of a minor child as a result of a parent's disability may be credited toward that parent's support obligation commencing at such time as the benefit is received and not exceeding the monthly support obligation set forth in the decree of divorce." *Pride, supra*, at 263.

McNeal began as a paternity action in 1981. The father was ordered to pay child support. Subsequently, in 1989, the mother filed a motion for an increase in the child support payments, which the trial court granted. In 1991, the father filed a motion seeking an order terminating child support based upon the minor child's receipt of social security benefits.

As result of the father's retirement, the child was receiving social security benefits of $280.00 per month. Under the most recent court order, the father's child support obligation was $245.94 per month. Accordingly, the trial court granted the father's motion to terminate child support.

On appeal, the parties entered certain stipulations. The father's gross income was $25,164.00 a year from retirement benefits. The father's gross income did not include the $280.00 in social security derivative benefits received by the parties' child. The mother's gross income was $32,000.00 per year. Under the Child Support Guidelines set forth in R.C. 3113.215, the combined annual child support obligation was $7,200.00 ($600.00 per month).

The *McNeal* court held that "the guideline determination of necessary support remains unaffected by the fact of receipt by the child of Social Security benefits." *McNeal, supra*, at 39. The court went on to explain that:

> "The proper method is to deduct all or part of the Social Security benefits received on behalf of the child from the guideline-determined necessary child support predicated upon the best interests of the child and equity to both parents. If it be determined that the entire amount of Social Security benefits should be deducted from child support, the $600 per month guideline-determined child support need

> would be reduced by the amount of the Social Security payments, so that the remaining $320 per month need would be allocated between the parents in the manner set forth in the guideline determinations, and forty-four percent of that amount, or $140.80 per month, would be [the father's] reduced child support obligation." *Id.*

In *Stephenson v. Stephenson* (Mar. 18, 1996), Mahoning App. No. 94 C.A. 67, unreported, 1996 WL 133000, the parties were divorced in 1986 and the father was granted custody of the parties' three children. Originally, the father was to be solely responsible for the financial support of the children. However, in 1990, the trial court ordered the mother to pay $33.33 per child, hi-monthly, in child support.

In 1993, the father filed a motion to increase the wife's child support obligation. The matter was heard by a referee who subsequently filed a report. The father's total annual gross income consisted of social security disability benefits which amounted to $9,024.00. The mother's total annual gross income was $16,029.00. The father was receiving $297.00 per month ($3,564.00 annually) for all three children as a social security derivative benefit.

Pursuant to the Child Support Guidelines set forth in R.C. 3113.215, the combined annual child support obligation was $7,917.00. However, the referee found that since the social security derivative benefit was intended as child support, it was appropriate to reduce the total annual child support obligation. Accordingly, the referee deducted the $3,564.00 in social security derivative benefits from the total annual child support obligation and arrived at a new combined child support obligation of $4,353.00. The father was found to be responsible for 36 percent of this obligation, amounting to $1,567.00, and the

mother was found to be responsible for 64 percent of the obligation, amounting to $2,786.00.

On appeal, the *Stephenson* court examined the approaches taken by *Pride* and *McNeal*. The court adopted the Pride analysis and went on to reverse the trial court and held "that social security derivative payments received on behalf of a minor child as a result of a parent's disability should be credited towards that parent's support obligation, commencing at such time as the benefit is received and not exceeding the monthly support obligation as required by the guidelines." *Id.* at *3.

This court revisited the issue again In *In re Mudrak* (Jan. 22, 1997), Belmont App. No. 94–B–32, unreported, 1997 WL 28557. *Mudrak* involved a mother and father who were married with two children. In 1983, the mother died and the children were placed in the care and custody of the maternal grandparents and the father was ordered to pay child support.

In 1994, the father filed a motion to modify his child support payments. The parties stipulated that the father's total annual gross income was $17,680.00 and that, as a result of the mother's death, the grandparents received annual social security benefits amounting to $4,044.00 for the one child who remained unemancipated.

The father presented the combined annual child support obligation as $3,432.00. The father's argument before the trial judge was that he should receive a dollar for dollar credit against his child support payments for the social security benefits received by the grandparents on behalf of his child resulting in a zero obligation after the credit was made.

The trial court rejected the father's argument of a dollar for dollar credit. The trial court found the social security

benefits to be income which should be added to the father's annual income to arrive at the combined annual child support obligation of $3,321.00 under the child support guidelines.

On appeal, this court affirmed. The *Mudrak* majority relied in part on this court's previous decision in *Stephenson, supra.* For unknown reasons, the *Mudrak* majority thought that the referee in *Stephenson* had added the social security benefits received by the father on behalf of his children to the mother's income and that, on appeal, this court had sanctioned that approach.[2] In *Stephenson*, the referee did not add the social security benefits received by the father on behalf of his children to the mother's income. The referee, following the *McNeal* approach, deducted the social security derivative benefits from the total combined annual child support obligation rather than deducting the benefits just from the father's percentage or portion of the total combined annual child support obligation. In *Stephenson*, this court rejected the *McNeal* approach and adopted the method utilized in *Pride*. *Stephenson* found that since the social security derivative benefits were received as a result of the father's disability, he, and only he, should be given a credit for the benefits against his percentage or portion of the total combined annual child support obligation.

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[2] The *Mudrak* majority interpreted the calculation made in *Stephenson* as follows:

> "In calculating the support owed, the referee added the social security benefits received by [the father] on behalf of his children to [the mother's] income and arrived at a total annual support figure of $7,917.00. The referee then deducted the social security benefits of $297.00 per month from the total support figure. The result was an annual support figure of $4,353.00."

In addition to relying on *Stephenson*, the *Mudrak* majority also re—examined the *McNeal* and *Pride* decisions. The majority viewed *McNeal* as holding that social security derivative benefits "should be added to the obligor's income to arrive at an annual income for purposes of determining support."[3] *Mudrak, supra*, at *5. This was not the holding of *McNeal*. *McNeal* held that the benefits should be deducted from the combined annual child support obligation and then, to that amount, applied each parties' percentage obligation. McNeal, supra, at 39. In contrast, the import of *McNeal* is that the benefits should not be added to either parties' income.[4] *Id.*

Based on its interpretation of *Pride*, the *Mudrak* majority went on to hold that social security payments received by the grandparents on behalf of the minor child should be added to the father's annual salary to

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[3] The *Mudrak* majority stated:

> "We agree in part with the [*McNeal*] court that the social security benefits should be added to the obligor's income to arrive at an annual income for purposes of determining support. Where we differ with the [*McNeal*] reasoning is in calculating the total support to be paid. The [*McNeal*] court took the position that the social security benefits should be deducted from the final support amount and to this figure the relative percentages would be applied to yield a final child support figure. We find that application of that method to the facts of this case would not be in the best interest of the child.

[4] *McNeal* commented that "the guideline determination of necessary child support remains unaffected by the fact of receipt by the child of Social Security benefits." *McNeal, supra*, at 39.

arrive at an annual child support figure.[5] Again, as with *Stephenson* and *McNeal*, Pride did not hold that the benefits should be added to either parties' income, let alone to the party who did not cause the benefits to be issued.

In summary, the *Mudrak* majority misinterpreted the import of *McNeal* and *Pride*, and this court's previous decision in *Stephenson*. None of these decisions held that social security derivative benefits should be added to the income of the parents in making the guideline determination of support. *McNeal* held that the benefits should be deducted from the combined annual child support obligation and then, to that amount, applied each parties' percentage obligation. *McNeal, supra*, at 39. *Pride* held that the benefits should be deducted, not from the combined annual child support obligation, but from the portion of the combined annual child support obligation attributed to the parent whose disability occasioned the issuance of the benefits. *Pride, supra*, 263. In *Stephenson*, this court adopted the position taken by *Pride*. *Stephenson, supra*, at *3.

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[5] The *Mudrak* majority stated:

> "Following our decision in Pride, supra, we hold that the social security payments received by the [grandparents] on behalf of the minor child should be added to [the father's] annual salary to arrive at an annual child support figure. Then the relative percentages should be applied to arrive at [the father's] annual obligation of $3,321.00. As [the father] is not the parent, in this case, whose disability occasioned the social security award to [the child], his child support cannot be credited with the social security payments."

For purposes of clarification, we hold that social security derivative payments received on behalf of a minor child as a result of a parent's disability should not be added to the income of either parent in making the guideline determination of support. Furthermore, we reiterate our holding in *Stephenson* that social security derivative payments received on behalf of a minor child as a result of a parent's disability should be credited towards that parent's support obligation, commencing at such time as the benefit is received and not exceeding the monthly support obligation as required by the guidelines.

Applying the foregoing principles to the case now before us, we find that the trial court erred by including the social security derivative benefits received on behalf of the child as a result of appellee's disability to appellee's income in making the guideline determination of support. Therefore, appellant's first assignment of error has merit.

Under appellant's second assignment of error, he argues that the trial court erred by not following the *McNeal* approach. Since we have expressly disapproved of that approach, appellant's second assignment is without merit. Furthermore, in reviewing the child support calculation worksheets prepared by the trial court, it is apparent that the court did not apply either the *McNeal* approach or the *Pride* approach, as approved by this court in *Stephenson*. Applying *Stephenson*, the court should have credited the social security derivative benefits received on behalf of the child as a result of appellee's disability towards appellee's support obligation. However, since the court designated appellant as the obligor, the omission is harmless.

The decision of the trial court is hereby reversed and this matter is remanded to the trial court for further proceedings according to law and consistent with this court's opinion. Specifically, on remand, the trial court shall recalculate the guideline determination of child support without including the child's social security derivative benefits in appellee's income.

Cox, J., concurs
Vukovich, J., concurs

APPROVED:
s/ Gene Donofrio
GENE DONOFRIO
Judge

JOURNAL ENTRY:

For the reasons stated in the opinion rendered herein, the first assignment of error is found to be with merit and is sustained. The second assignment of error is found to be without merit and is overruled. It is the final judgment and order of this Court that the judgment of the Common Pleas Court, Domestic Relations Division, of Mahoning County, Ohio, is reversed, and this cause is remanded to the trial court for further proceedings according to law and consistent with this court's opinion. Costs to be taxed against appellee.

s/ Edward A. Cox
s/ Gene Donofrio
s/ Joseph J. Vukovich

APPENDIX B–Judgement Entry Of
The Mahoning County Court Of Common Pleas,
Domestic Relations Division

CASE NO. 82 DR 1081

IN THE COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
MAHONING COUNTY, OHIO

DAVID P. CERVONE,

Plaintiff

v.

ELIZABETH M. CERVONE, N.K.A.
ELIZABETH M. MATTEUCCI

Defendant

Decided and Filed April 10, 1998

JUDGMENT ENTRY

JUDGE: BETH A. SMITH

This cause is before the Court on Plaintiffs Appeal/ Objection to the Decision of the Magistrate dated November 24, 1997.

1.) The Magistrate, inter alia, concluded that the Social Security benefits received by Defendant on behalf of the

parties' child should be added to Defendant's income for the purposes of calculating the parties' respective child support obligations. Furthermore, the Magistrate concluded that Plaintiff should not be credited with the Social Security benefits received by the child-- in other words, that Plaintiffs child support obligation should not be "set off" by the amount of Social Security benefits received by the child.

Plaintiff objects to the failure of the Magistrate to give him credit for the amount of Social Security benefits received by his son, and to the Magistrate's application of said Social Security benefits in the calculation of Plaintiffs child support obligation (see "Plaintiff's Appeal/Objection," paragraphs 4 and 5). The Court finds these objections to be without merit.

Where the Ohio Supreme Court is silent, this Court is bound by the decisions of the Seventh District Court of Appeals. As the Magistrate noted in his Decision, the Seventh District Court of Appeals has "had occasion to review a number of previous decisions addressing the treatment of Social Security [d]erivative benefits received by a minor child as a result of a parent's disability."[1] In the case of *In re Mudrak*[2] the Court of Appeals expressed that, for purposes of determining support, the Social Security benefits should be added to the income of the parent whose disability had occasioned the

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[1] See Decision of the Magistrate at pp. 6-7 (Paragraph 13).

[2] *In re Mudrak*, No. 94-B-32, No. 94-B-38, 1997 Ohio App. LEXIS 216 (Ohio App. 7 Dist., Jan. 22, 1997).

derivative benefits to the child.[3] Then, after an annual support figure is reached, the relative percentages should be applied to arrive at the annual child support obligations.[4] The Court specifically disagreed with the position that Social Security benefits should be deducted from the final support amount before the relative percentages are applied to yield a final child support figure.[5] Furthermore, the Court of Appeals specifically refused to credit the father with the Social Security payments because it was not his disability or death that caused the payments.

In accordance with *Mudrak* therefore, this Court will affirm the Decision of the Magistrate with regard to the application of Social Security derivative benefits for the purpose of determining child support. Plaintiffs Objections regarding the Social Security payments (see "Plaintiffs Appeal/Objection," Paragraphs 4 and 5) are hereby overruled.

2.) Plaintiff also objects that the Magistrate did not use the proper figures on the child support worksheet used to compute Plaintiffs child support arrearage for the period

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[3] The Magistrate noted that a clerical error in the opinion had been made which would have added the benefits to the father's income instead of to the maternal grandparents' income (it was the wife's death which occasioned the derivative benefits to the child in this case). After a conference with the Clerk of the Court of Appeals the Magistrate verified that the clear intent of the Appellate Court was to add the derivative benefits to the income of the party whose disability or death occasioned the benefits (see Paragraph 13 of the Decision).

[4] *In re Mudrak*, at *5

[5] *Id.*

commencing in October of 1996 and ending in June of 1997.[6] Upon inspection of the worksheet (see Exhibit C in the Decision of the Magistrate), the Court finds Plaintiffs objection to have some merit. Rather than vacate the Decision in its entirety, however, the Court will modify certain of the figures and then adopt the modified Decision. Paragraph 1(a) of the worksheet will remain unchanged, for during the period in question, Plaintiff was employed at Mutual of Omaha and his base salary was $14,400.00. Paragraph 1(b) requires some correction. At the time of the hearing 1996 was the "last calendar year." Therefore, the figure to be used for "last calendar year" is $57,844.60, the *amount* of overtime and bonuses Plaintiff earned in 1996. The figures to be used for "Yr. 2(2 yrs ago)" and "Yr. 3 (3 yrs ago)" are $28,484.83 and $11,707.16, which are the figures representative of Plaintiffs overtime and bonuses earned in 1995 and 1994, respectively.

3.) Finally, Plaintiff objects that the Magistrate did not use the proper income for its determination of Plaintiffs child support obligation commencing in July of 1997, when Plaintiff began receiving unemployment compensation. The Magistrate's figure for Plaintiffs annual income from unemployment compensation was $17,940.00,[7] but Plaintiff states that the proper figure is "$8,970.00, as provided in the evidence to the Magistrate."[8] To this Court's knowledge, the

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[6] See Plaintiffs Appeal/Objection," Paragraphs I and 2, objecting to figures used in Decision of the Magistrate, Exhibit C, Paragraphs 1(a) and (b).

[7] See Decision of the Magistrate, Exhibit D.

[8] Plaintiff's Appeal/Objection, Paragraph 3.

record is devoid of any evidence that supports Plaintiffs assertion. Nor was any evidence (e.g., an unemployment compensation stub) provided to this Court along with Plaintiffs Appeal/Objection. Indeed, the Magistrate performed his calculation of Plaintiffs child support obligation in the presence of the parties at the hearing.

However, it appears that the transcript of the October 29, 1997 hearing may be incomplete. It ends abruptly and unnaturally, and there seems to be no clear evidence of Plaintiffs total annual unemployment compensation. For this reason, for the sake of accuracy, the Court will sustain this objection.

The Court enters the following Order:

Pursuant to Ohio Civil Rule 53(E).[9] the Court will recommit this matter to the Magistrate for the corrections noted in Paragraph 2 above (regarding the figures used in the calculation of Plaintiffs child support arrearage), and for a determination of the actual total of Plaintiff's unemployment compensation, referenced in Paragraph 3 above. Finally, as noted above in Paragraph 1, the Court fully approves of the method, used by the Magistrate with regard to the Social Security issue. Therefore, that part of the Magistrate's Decision, as well as the remainder of the Decision which was not recommitted to the Magistrate, is hereby adopted as the Order of this Court.

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[9] Ohio Civil Rule 53(E)(4)(b) provides in pertinent part: "Upon consideration of any objections, the court may adopt, reject, or modify the magistrate's decision, hear additional evidence, recommit the matter to the magistrate with instructions, or hear the matter."

The parties' attorneys shall contact the Court within one week of receipt of this Judgment Entry to schedule a hearing before Magistrate Huberman.

Date 4-10-98

s/ Beth A. Smith
BETH A. SMITH
Judge Beth a. Smith

APPENDIX C–Order Of The Ohio Seventh District Court Of Appeals Certifying Conflict

CASE NO. 98 CA 99

STATE OF OHIO, MAHONING COUNTY,
IN THE COURT OF APPEALS
SEVENTH DISTRICT

DAVID P. CERVONE,
Plaintiff-Appellant

v

ELIZABETH M. CERVONE N.K.A.
ELIZABETH M. MATTEUCCI,
Defendant-Appellee

February 16, 2000, Decided
February 16, 2000, 1999, Filed

Civil Appeal from Mahoning County Common Pleas Court,
Domestic Relations Division
Case No. 82-DR-1081

JUDGMENT: Issue certified for review

JUDGES:
Hon. Gene Donofrio
Hon. Edward A. Cox
Hon. Joseph J Vukovich

Plaintiff-appellant, David P. Cervone, has filed a motion asking this court to certify the record in this case to the Ohio Supreme Court for review and final determination. Appellant contends that our decision and judgment entry in *Cervone v. Cervone* (Jan. 11, 2000), Mahoning App. No. 98CA99, unreported, conflicts with *McNeal v. Cofield* (1992), 78 Ohio App.3d 35; *Previte v. Previte* (1994), 99 Ohio App.3d 347; *Carpenter v. Reis* (1996), 109 Ohio App.3d 499; *Frucht.nicht v. Fruchtnicht* (1997), 122 Ohio App.3d 492; and numerous unreported cases.

Certification of a conflict is governed by Section 3(B)(4), Article 4 of the Ohio Constitution, which reads as follows:

> "Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination."

The Ohio Supreme Court has previously stated that at least three conditions must be met prior to certifying a conflict:

> "First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be 'upon the same question.' Second, the alleged conflict must be on a rule of law — not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the

> same question by other district courts of appeals." (Emphasis *sic.). Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596

In *Cervone v. Cervone* (Jan. 11, 2000), Mahoning App. No. 98CA99, unreported, this court addressed the issue of what affect social security derivative benefits should have on the determination of child support. We reviewed *McNeal v. Cofield* (1992), 78 Ohio App.3d 35, cited by appellant, and *Pride v. Nolan* (1987), 31 Ohio App.3d 261, the two primary cases dealing with the issue, each taking a different approach. Relying on our previous decision in *Stephenson v. Stephenson* (Mar. 18, 1996), Mahoning App. No. 94 C.A. 67, unreported, 1996 WL 133000, we reaffirmed our adherence to the approach taken by *Pride* holding that social security derivative payments received on behalf of a minor child as a result of a parent's disability should be credited towards *that parent's* support obligation, commencing at such time as the benefit is received and not exceeding the monthly support obligation as required by the guidelines.

In *Cervone,* we acknowledged the authority to the contrary represented by *McNeal.* In *McNeal,* the Tenth District Court of Appeals held that that the benefits should be deducted from the combined annual child support obligation and then, to that amount, applied each parties' percentage obligation. *Id.* at 39. In his motion to certify, appellant cites to numerous reported and unreported cases following the approach taken by *McNeal.*

Based on the foregoing, we find that this court's decision in *Cervone* conflicts with the Tenth District's decision in *McNeal.* Accordingly, appellant's motion to certify is hereby sustained. The issue certified for review

is how social security derivative payments received on behalf of a minor child as a result of a parent's disability should be credited towards *that parent's* support obligation.

s/ Gene Donofrio
GENE DONOFRIO
Judge Gene Donofrio

s/ Edward A. Cox
EDWARD A. COX
Judge Edward A. Cox

s/ Joseph J. Vukovich
JOSEPH J. VUKOVICH
Judge Joseph J. Vukovich

APPENDIX D–Judgment Entry Of The Ohio Supreme Court Dismissing Certification Of Conflict

CASE NO. 00-486

THE SUPREME COURT OF OHIO

88, Ohio St.3d 1511; 728 N.E.2d 400

DAVID P. CERVONE,

Appellant

v

ELIZABETH M. CERVONE N.K.A.
ELIZABETH M. MATTEUCCI,

Appellee

Decided an Filed May 17, 2000

On appeal from the Mahoning County Court of Appeals, Seventh Appellate District

JUDGMENT ENTRY

THOMAS J. MOYER, Chief Justice

This cause is pending before the Court on certification of conflict by the Court of Appeals for Mahoning County. On review of the order certifying a conflict,

IT IS DETERMINED that no conflict exists within the meaning of S. Ct. Prac. R. IV, Section 2(B). Accordingly,

IT IS ORDERED by the Court that this cause be, and hereby is, dismissed.

IT IS FURTHER ORDERED that the appellee recover from the appellant her costs herein expended; and that a mandate be sent to the Court of Appeals for Mahoning County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Mahoning County for entry,

COSTS:

Docket Fee, $40.00 paid by David P. Cervone

(Mahoning County Court of Appeals; No. 98CA99)

s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX E–Judgment Entry Of The Ohio Supreme Court Dismissing Discretionary Appeal

CASE NO. 00-376

THE SUPREME COURT OF OHIO

88, Ohio St.3d 1515; 728 N.E.2d 403

DAVID P. CERVONE,

Appellant

v

ELIZABETH M. CERVONE N.K.A.
ELIZABETH M. MATTEUCCI,

Appellee

Decided an Filed May 17, 2000

On appeal from the Mahoning County Court of Appeals,
Seventh Appellate District

JUDGMENT ENTRY

THOMAS J. MOYER, Chief Justice

Upon Consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case. Docket Fee, $40.00, paid by David P. Cervone.

(Mahoning County Court of Appeals; No. 98CA99

s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX F–Judgment Entry Of The Ohio Supreme Court Denying Motion For Reconsideration

CASE NO. 00-376

THE SUPREME COURT OF OHIO

89 Ohio St.3d 1443; 2000 Ohio App. LEXIS 1695

DAVID P. CERVONE,

Appellant

v

ELIZABETH M. CERVONE N.K.A.
ELIZABETH M. MATTEUCCI,

Appellee

Decided an Filed July 12, 2000

On appeal from the Mahoning County Court of Appeals,
Seventh Appellate District

JUDGMENT ENTRY

THOMAS J. MOYER, Chief Justice

IT IS ORDERED by this Court that the motion for reconsideration in this case be, and hereby is, denied.

(Court of Appeals No. 98CA99)

s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice